Filed 8/26/19 P. v. Caldwell CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. SULIEMAN CALDWELL, Defendant and Appellant.	D074753 (Super. Ct. No. SCD277113)

APPEAL from a judgment of the Superior Court of San Diego County, Laura W. Halgren, Judge. Reversed and remanded with instructions.

Denise M. Rudasill, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson and Allison V. Acosta, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Sulieman Caldwell guilty of one count of robbery (Pen. Code, § 211).[1] Caldwell admitted a prior serious felony (§§ 667, subd. (a)(1), 668, 1192.7, subd. (c), and a prior strike (§§ 667, subds. (b)-(i), 1170.12, 668). The trial court sentenced Caldwell to nine years in prison.

Caldwell contends (1) the trial court erred in excluding testimony about his out-of-court statements after the robbery; (2) this matter should be remanded to allow the trial court to decide whether to exercise its newly-conferred discretion to strike the five-year sentence enhancement imposed for Caldwell's prior serious felony conviction; and (3) this matter should be remanded for the trial court to decide whether to grant pretrial mental health diversion under section 1001.36, which went into effect before Caldwell's trial, but which was not raised in the trial court.

We conclude that the trial court did not prejudicially abuse its discretion in excluding testimony about Caldwell's out-of-court statements. We next determine that remand is warranted for the trial court to consider whether to exercise its discretion to strike the enhancement for Caldwell's prior serious felony. Finally, we decide that Caldwell forfeited his ability to seek a remand for the purposes of having the trial court consider whether to grant pretrial diversion, as he did not raise the issue below. Accordingly, we reverse and remand for the limited purpose of allowing the trial court to consider whether to strike the five-year sentence for the prior serious felony.

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1 Unless otherwise indicated, all further statutory references are to the Penal Code.

I.

FACTUAL AND PROCEDURAL BACKGROUND

On May 19, 2018, at approximately 7:20 a.m., Caldwell was riding a bicycle in downtown San Diego near a trolley station. Caldwell rode up to a man, A.V.,[2] who was standing in a parking lot. Caldwell got off his bicycle, and after briefly speaking with A.V., he grabbed a cloth shopping bag that A.V. was holding. The bag apparently contained cartons of cigarettes. A.V. and Caldwell struggled over the bag, which ended up ripping open, spilling its contents on the ground. As A.V. bent over to pick up the contents of the bag, Caldwell struck A.V. several times, including in the face. Caldwell then took some of the cigarette packages from the ground, got back on his bicycle and rode away. A transit officer witnessed the end of the incident and apprehended Caldwell after he crossed the street. Caldwell had some of A.V.'s cigarettes in his possession.

Police officers arrived on the scene, and after they conducted a brief investigation, including speaking with A.V. and reviewing a surveillance video, Caldwell was arrested and charged with one count of robbery. It was also alleged that Caldwell incurred a prior serious felony (§§ 667, subd. (a)(1), 668, 1192.7, subd. (c)), and a prior strike (§§ 667, subds. (b)-(i), 1170.12, 668) based on a 2016 conviction for preventing or dissuading a witness (§ 136.1, subd. (a)).

During an in limine hearing, the People moved to exclude evidence of statements that Caldwell made to officers shortly after the robbery on the ground that they

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2 To protect the privacy of the victim of Caldwell's crime, we refer to him by his initials, and we intend no disrespect by doing so.

constituted inadmissible hearsay. Defense counsel stated that she wanted to introduce evidence of statements made by Caldwell to officers after the robbery "that go directly to his state of mind," arguing that those statements "are nonhearsay state of mind statements." To clarify, the trial court asked whether defense counsel intended to offer those statements "as [a hearsay] exception under [Evidence Code section] 1250 as an existing mental or physical" sensation. Defense counsel confirmed that was her intention. The trial court then reviewed the transcript of the preliminary hearing, which contained the following testimony from three witnesses about Caldwell's statements after the robbery.

First, when Metropolitan Transit System Code Compliance Inspector (CCI) Colby Young, spoke to Caldwell immediately after the incident, Caldwell said that A.V. had a knife and was the aggressor. However, after officers investigated and found no weapon at the scene, CCI Young spoke to Caldwell again. CCI Young twice asked Caldwell why he took the cigarettes, and both times Caldwell stated that "the attorney general told him that individuals were selling cigarettes at 12th and Imperial, and he was told to go and obtain those and give them to the attorney general himself."[3]

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3 Although CCI Young testified that Caldwell referred to "the attorney general," Caldwell's appellate brief suggests that Caldwell may have been intending to refer to the Surgeon General, presumably because a Surgeon General warning appears on cigarette boxes. As it is unclear which government agency Caldwell intended to reference, we will refer to "the attorney general."

Next, Officer Eric Skyher talked to Caldwell after arriving on the scene. Caldwell said that "he was sick and tired of the illegal cigarette sales in the area." Caldwell also said that A.V. pulled a knife on him and that he was afraid as a result.

Finally, approximately 30 minutes after the incident, Detective Daniel Vaquero interviewed Caldwell. Caldwell stated that A.V. "was selling cigarettes and he was there to stop him from doing that." Caldwell told Detective Vaquero that "he took the cigarettes to bring them down to our police station."

After reviewing the preliminary hearing transcript, the trial court summarized the statements that both Caldwell and A.V. made to the officers on the scene, and concluded that they were all hearsay statements:

> "I had a chance to look at the preliminary hearing transcript and review the statements that were attributed to Mr. Caldwell. It seems there [are] a few categories of statements that were attributed to him including him saying that [A.V.] had used a knife, him giving explanations about why he took the cigarettes, his statements about that he picked them up from the ground and that he made statements about being tired of illegal cigarette sales in the area and . . . also made comments, I believe, to somebody that the victim had pulled a knife and that he was afraid. So there were also statements that [A.V.] made to officers that were elicited at the prelim. And my view is that all the statements by both sides fall within the hearsay category."

The trial court explained that the statements were made when "the officers were trying to figure out what's going on, and it's a situation where either person might be offering self-serving statements." The statements therefore "lack[ed] indicia of credibility." The trial court concluded that because the statements were made under circumstances indicating they were not trustworthy, they would be excluded pursuant to

Evidence Code section 1252 despite the state-of-mind exception to the hearsay rule set forth in Evidence Code section 1250.

At trial, the jurors heard testimony from the officers who interacted with Caldwell, and they viewed multiple surveillance videos showing the incident. However, because of the trial court's in limine ruling, the jurors heard no evidence about Caldwell's claim that he was afraid because he thought A.V. had a knife or that he took the cigarettes from A.V. because the attorney general had instructed him to do so. Instead, defense counsel focused during closing argument on the contention that the People had not proven that Caldwell had an intent to steal at the time he used force on A.V.

The jury found Caldwell guilty of robbery, and Caldwell admitted a prior felony and a prior strike. After denying Caldwell's motion to strike his prior strike, the trial court imposed a nine-year prison sentence. The nine-year sentence consisted of a low-term sentence of two years for the robbery conviction, which was doubled to four years because of the prior strike, in addition to a five-year term for the prior serious felony.

II.

DISCUSSION

A. *The Trial Court Did Not Prejudicially Abuse Its Discretion by Excluding Evidence of Caldwell's Statements to Officers After the Incident*

We first consider Caldwell's contention that the trial court prejudicially erred by excluding evidence of the statements that Caldwell made to the officers after the incident. " 'We review claims regarding a trial court's ruling on the admissibility of evidence for abuse of discretion.' " (*People v. Henriquez* (2017) 4 Cal.5th 1, 31 (*Henriquez*).)

1. *Circumstantial Evidence of Caldwell's State of Mind*

Caldwell's first argument is that some of his statements to the officers should have been admitted because they were not hearsay, but rather were nonhearsay *circumstantial* evidence of Caldwell's state of mind. As Caldwell points out, if the statements were not hearsay they should not have been excluded as untrustworthy under Evidence Code section 1252, as that provision applies only to *hearsay* statements that describe a declarant's state of mind.

a. *Applicable Legal Standards*

Before turning to the specific statements at issue we review the applicable legal standards. " ' "Hearsay evidence" is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.' (Evid. Code, § 1200, subd. (a).) 'Except as provided by law, hearsay evidence is inadmissible.' (*Id.*, subd. (b).)" (*Henriquez*, *supra*, 4 Cal.5th at p. 31.) Evidence Code section 1250 outlines an exception to the hearsay rule for statements that are offered to prove the declarant's state of mind. That section provides:

> "(a) Subject to Section 1252, evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when:
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> "(1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or
>
> "(2) The evidence is offered to prove or explain acts or conduct of the declarant.

> "(b) This section does not make admissible evidence of a statement of memory or belief to prove the fact remembered or believed."

Evidence Code section 1252 provides, "Evidence of a statement is inadmissible under this article if the statement was made under circumstances such as to indicate its lack of trustworthiness."[4]

In some cases, statements concerning a declarant's present state of mind can be admitted "as nonhearsay circumstantial evidence of a declarant's state of mind." (*People v. Clark* (2016) 63 Cal.4th 522, 591.) Nonhearsay circumstantial evidence of a declarant's state of mind consists of " '[s]tatements that do not directly declare a mental or emotional state, but are merely circumstantial evidence of it.' " (*Ibid.*, quoting 1 Witkin Cal. Evidence (5th ed. 2012) Hearsay, § 199, p. 1057.) The distinction between hearsay and circumstantial evidence of a declarant's statement of mind was explained at length in *People v. Ortiz* (1995) 38 Cal.App.4th 377. "The evidence admitted under [Evidence Code] section 1250 is hearsay; it describes a mental or physical condition, intent, plan, or motive and is received for the truth of the matter stated. . . . [¶] In contrast, a statement which does not directly declare a mental state, but is merely circumstantial evidence of that state of mind, is not hearsay. It is not received for the truth of the matter stated, but rather whether the statement is true or not, the fact such statement was made is relevant to a determination of the declarant's state of mind. . . . [¶] The threshold determination is

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4 The "article" referred to in Evidence Code section 1252 is Article 5, of Division 10, Chapter 2 of the Evidence Code. Article 5 comprises only Evidence Code sections 1250 through 1253, which deal solely with hearsay exceptions for statements of a mental or physical state.

whether the proffered statement is hearsay, i.e., whether it is being offered to prove the truth of its contents. ([Evid. Code,] § 1200.) The statement: 'I am afraid of John,' is hearsay if offered to prove that the declarant fears John. If the declarant's state of mind is relevant, the statement is admissible under [Evidence Code] section 1250. If a declarant says: 'John is dangerous,' the analysis becomes more difficult. If offered to prove John is dangerous, the statement is inadmissible hearsay. If, however, the statement is offered merely to prove the victim believed John to be dangerous, the statement is not offered for its truth (thus not hearsay) but merely as circumstantial evidence of the declarant's mental state. A similar result obtains when the statement describes conduct which the victim *believes* the appellant has engaged in. Examples include, 'John keeps calling my house and hanging up when I answer,' or 'John keeps driving by my house at night, but when I get to the window, he's gone.' The statement reflects a conclusion by the declarant which is manifestly unsupported by personal knowledge. However, if offered to prove the declarant's state of mind, the accuracy of the conclusion is irrelevant. If offered to prove a fearful state of mind of the declarant, what is important is not whether John actually engaged in the conduct, but that declarant *believes* he did." (*Ortiz*, at pp. 389-390.)

If a declarant's statement is admitted as nonhearsay circumstantial evidence of the declarant's state of mind, the admission of that evidence is not subject to Evidence Code section 1252, which disallows the admission of state-of-mind hearsay evidence made under circumstances that indicate its lack of trustworthiness. (*People v. Dalton* (2019) 7 Cal.5th 166, 232 [rejecting argument that statements introduced as circumstantial

evidence of the declarant's state of mind should have been excluded as untrustworthy under Evid. Code, § 1252 because " '[t]he evidence was admitted for a purpose other than for the truth of the matter asserted, and therefore need not have met the reliability requirements of a hearsay exception,' " and therefore a challenge to the statement's reliability " 'at most, goes to the weight of the evidence, and not its admissibility' "].)

b. *The Statements at Issue Were Not Circumstantial Evidence of Caldwell's State of Mind, and Instead Directly Described His Intent*

In arguing that some of the statements the trial court excluded were admissible as nonhearsay circumstantial evidence of his state of mind and thus were not subject to exclusion under Evidence Code section 1252 as untrustworthy, Caldwell focuses on (1) his statement to CCI Young that "the attorney general told him that individuals were selling cigarettes at 12th and Imperial, and he was told to go and obtain those and give them to the attorney general himself," and (2) his statements to Detective Vaquero that A.V. "was selling cigarettes and he was there to stop him from doing that," and "he took the cigarettes to bring them down to our police station." As we will explain, the trial court was within its discretion to conclude that those two statements were *direct* statements by Caldwell about his state of mind rather than circumstantial evidence.[5]

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[5] The People contend that Caldwell forfeited his ability to argue on appeal that the statements should have been admitted as circumstantial evidence of his state of mind, as defense counsel did not make that precise argument in the trial court. (Evid. Code, § 354.) Although the issue is close because defense counsel did not clearly explain her argument, we conclude that the argument was properly preserved, as defense counsel argued that the statements should be admitted because they "go directly to his state of mind" and were "nonhearsay state of mind statements." Even were we to conclude that the argument was not preserved, we would nevertheless exercise our discretion to reach

Turning first to Caldwell's statements to Detective Vaquero that A.V. "was selling cigarettes and he was there to stop him from doing that," and "he took the cigarettes to bring them down to our police station," we conclude both statements are *direct* explanations by Caldwell to Detective Vaquero about his intent in taking the cigarettes. On their face, the statements are comprised of direct assertions about Caldwell's state of mind. Accordingly, Caldwell's statements are hearsay because they are offered for the truth of what Caldwell asserted, namely that his intent in taking the cigarettes was to stop A.V. from selling them and to bring them to the police station.

With respect to Caldwell's statement to CCI Young that "the attorney general told him that individuals were selling cigarettes at 12th and Imperial, and he was told to go and obtain those and give them to the attorney general himself," Caldwell points out that the description of what the attorney general said to him was not offered for the truth of the matter, as the statement is inherently incredible and seems delusional. Caldwell contends that, therefore, the statement must have been offered as nonhearsay circumstantial evidence of his state of mind rather than as hearsay evidence. We understand Caldwell's argument, but we reject it because it does not consider the fact that Caldwell made the statement as a response to CCI Young's questioning about *why* he acted as he did. As described by CCI Young, Caldwell made the statement in response to a direct question about *why* Caldwell took the cigarettes. In substance, Caldwell responded that he took the cigarettes because he believed he had received directions to do

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the issue to address Caldwell's contention that counsel was ineffective for failing to preserve the issue.

so from the attorney general. Accordingly, the statement was a *direct* statement describing Caldwell's state of mind that was offered for the truth of the matter asserted therein, namely that Caldwell took A.V.'s cigarettes for a specific reason.

In sum, we conclude that none of the statements at issue were admissible as nonhearsay circumstantial evidence of Caldwell's state of mind. Instead, they were all direct statements by Caldwell explaining *why* he took the cigarettes from A.V. Accordingly, all of the statements were hearsay, which was required to be excluded under Evidence Code section 1252 if made under circumstances indicating a lack of trustworthiness.

c. *The Exclusion of the Statements Was Not Prejudicial*

Even were we to conclude that Caldwell's statements about why he took the cigarettes should have been admitted as nonhearsay circumstantial evidence of Caldwell's state of mind, Caldwell has not met his appellate burden to show that there is a reasonable probability he would have obtained a more favorable outcome had the statements been admitted into evidence. (See *People v. DeHoyos* (2013) 57 Cal.4th 79, 131 [applying "reasonable probability" standard in reviewing prejudice attributable to the erroneous exclusion of evidence].)

Caldwell contends that if the jury learned that he was under a delusion that the attorney general had directed him to take the cigarettes and bring them to the police station, the People would not have been able to establish that he had the intent necessary for the commission of robbery. As we will explain, we disagree.

"Robbery is defined as 'the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.' ([] § 211.) . . . [¶] 'As a general rule, no crime is committed unless there is a union of act and either wrongful intent or criminal negligence.' . . . The intent required for robbery has been described as the specific intent to deprive the victim of the property permanently." (*People v. Anderson* (2011) 51 Cal.4th 989, 994.) The jury was accordingly instructed with CALCRIM No. 1600 that to establish robbery the People were required to prove that "1. The defendant took property that was not his own; [¶] 2. The property was in the possession of another person; [¶] 3. The property was taken from the other person or his immediate presence; [¶] 4. The property was taken against that person's will; [¶] 5. The defendant used force or fear to take the property or to prevent the person from resisting; [¶] AND [¶] 6. When the defendant used force or fear, he intended to deprive the owner of the property permanently."

Even had the trial court permitted the jury to hear evidence that Caldwell took the cigarettes from A.V. because he was under a delusion that the attorney general had instructed him to do so, that evidence would not serve to negate any of the elements of robbery. If Caldwell took the cigarettes with the intent to give them to the authorities, he still took them by force, and he still had the intent to permanently deprive A.V. of the cigarettes.

2. *The Trial Court Did Not Abuse Its Discretion in Ruling That the Hearsay Statements Were Made Under Circumstances Indicating a Lack of Trustworthiness*

With respect to one of the statements at issue, Caldwell acknowledges that it was hearsay because it directly described his state of mind, but he contends that the trial court erred in concluding that the statement was made under circumstances indicating a lack of trustworthiness. Specifically, Caldwell focuses on his statement to Officer Skyher that A.V. had pulled a knife on him and as result he was afraid.

"A hearsay statement that would otherwise be admissible under the state-of-mind exception (Evid. Code, § 1250, subd. (a)(1)) is inadmissible if made under circumstances that indicate the statement's lack of trustworthiness (*id.*, § 1252). A statement is trustworthy within the meaning of section 1252 of the Evidence Code when it is ' "made in a natural manner, and not under circumstances of suspicion. . . ." ' " (*People v. Harris* (2013) 57 Cal.4th 804, 843-844.) "Such declarations are admissible only when they are ' "made at a time when there was no motive to deceive." ' " (*People v. Edwards* (1991) 54 Cal.3d 787, 820.) " 'The decision whether trustworthiness is present requires the court to apply to the peculiar facts of the individual case a broad and deep acquaintance with the ways human beings actually conduct themselves in the circumstances material under the exception. Such an endeavor allows, in fact demands, the exercise of discretion.' . . . A reviewing court may overturn the trial court's finding regarding trustworthiness only if there is an abuse of discretion." (*Id*. at pp. 819-820, citations omitted.) A trial court is within its discretion to exclude evidence under Evidence Code section 1252 when there is " ' "ample ground to suspect defendant's

motives and sincerity" when he made the statements.' " (*People v. Smith* (2003) 30 Cal.4th 581, 629.)

Here, when Caldwell stated that he was afraid of A.V., he made the statement in response to questioning by law enforcement officers who were trying to figure out what happened during the incident. Caldwell, who is shown as the aggressor in the surveillance videos of the incident, plainly had a motive to fabricate a story for the law enforcement officers in an attempt to escape responsibility for the robbery. The trial court thus was within its discretion to conclude that Caldwell made the statements under circumstances in which he had a motive to deceive, and that the statements were accordingly required to be excluded for lack of trustworthiness under Evidence Code section 1252.[6]

3. *The Theory That the Statements Were Admissible as Spontaneous Declarations Was Not Preserved for Appeal*

As a final basis for admission of all of the statements that he made to the officers after the incident, Caldwell contends that the statements were admissible as spontaneous declarations under Evidence Code section 1240. He points out that the statements "were all initially made in such close proximity in time to the incident."

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6 As we have concluded that the hearsay rules also apply to Caldwell's statements that he took the cigarettes because of directions from the attorney general, those statements also were required to be excluded under Evidence Code section 1252 if they were made under circumstances indicating a lack of trustworthiness. The trial court was within its discretion to conclude that those statements also were made under circumstances indicating a lack of trustworthiness because they too were in response to law enforcement questioning about the incident.

Evidence Code section 1240 provides, in pertinent part, that evidence is "not made inadmissible by the hearsay rule" if it "[p]urports to narrate, describe, or explain an act, condition, or event perceived by the declarant" and it was "made spontaneously while the declarant was under the stress of excitement caused by such perception." (Evid. Code, § 1240, subds. (a), (b).)

Because defense counsel did not raise Evidence Code section 1240 as a basis for admission of the statements, Caldwell has forfeited the argument on appeal. (*People v. Ervine* (2009) 47 Cal.4th 745, 779 ["The issue is not cognizable on appeal because defendant did not present that theory of admissibility at trial"]; *People v. Livaditis* (1992) 2 Cal.4th 759, 778 ["The proponent of hearsay has to alert the court to the exception relied upon and has the burden of laying the proper foundation."].)

Caldwell contends that his argument that the statement should have been admitted under Evidence Code section 1240 is not forfeited because it would have been futile for defense counsel to seek admission on that basis in light of the trial court's ruling that the statements were inadmissible under Evidence Code section 1252 as made under circumstances indicating a lack of trustworthiness. We reject this argument because evidence introduced as a spontaneous declaration under Evidence Code section 1240 need not be excluded for lack of trustworthiness. (Evid. Code, § 1252 [applying only to statements made admissible "under this article," which covers statement of mental or physical state].) The trial court's view that the statements were not trustworthy might have factored into a ruling on whether the statements qualified as spontaneous declarations, had defense counsel sought admission on that ground. However, the issues

are not identical. (See *People v. Gutierrez* (2009) 45 Cal.4th 789, 810 ["Spontaneous statements are deemed sufficiently trustworthy to be admitted into evidence because ' " 'in the stress of nervous excitement the reflective faculties may be stilled and the utterance may become the unreflecting and sincere expression of one's actual impressions and belief.' " ' "].) Therefore, defense counsel was required to raise Evidence Code section 1240 as a basis for admission, and Caldwell's appellate argument is forfeited for failure to do so.[7]

B. *Remand for Consideration of Discretion to Strike the Five-Year Enhancement for Caldwell's Prior Serious Felony*

The trial court imposed a five-year prison term enhancement under section 667, subdivision (a) based on Caldwell's admission that he incurred a prior serious felony. (§ 667, subd. (a).) On September 30, 2018, after Caldwell's September 18, 2018 sentencing, the Legislature enacted Senate Bill 1393 (Stats. 2018, ch. 1013, §§ 1-2),

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[7] Caldwell contends that defense counsel was ineffective for failing to argue that the statements were admissible as spontaneous declarations under Evidence Code section 1240. We decline to reach the issue on direct appeal. "[B]ecause, in general, it is inappropriate for an appellate court to speculate as to the existence or nonexistence of a tactical basis for a defense attorney's course of conduct when the record on appeal does not illuminate the basis for the attorney's challenged acts or omissions, a claim of ineffective assistance is more appropriately made in a habeas corpus proceeding, in which the attorney has the opportunity to explain the reasons for his or her conduct. . . . '[T]o promote judicial economy in direct appeals where the record contains no explanation, appellate counsel who wish to raise the issue of inadequate trial representation should join a verified petition for writ of habeas corpus.' " (*People v. Wilson* (1992) 3 Cal.4th 926, 936; see also *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267 [where facts necessary to a determination of whether certain evidence should have been excluded were not developed at trial, and it was not known why counsel failed to move to suppress the evidence, "[a] claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding"].)

which amended section 1385 to give the trial court discretion to strike five-year enhancements for prior serious felony convictions under section 667, subdivision (a). Effective January 1, 2019, Senate Bill 1393 amended section 1385 by deleting subdivision (b), which previously stated: "This section does not authorize a judge to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667." Caldwell contends that because his conviction is not yet final, we should remand this matter to allow the trial court to decide whether to exercise its discretion to strike the five-year enhancement imposed under section 667, subdivision (a).

The People agree that the amendment to section 1385 providing the trial court with discretion to strike a five-year enhancement for a prior serious felony conviction under section 667, subdivision (a) applies retroactively to non-final cases. (See *People v. Garcia* (2018) 28 Cal.App.5th 961, 971-972 [Senate Bill 1393 "applies retroactively to all cases or judgments of conviction in which a five-year term was imposed at sentencing, based on a prior serious felony conviction, provided the judgment of conviction is not final when [it] becomes effective on January 1, 2019"].) However, the People contend that it would be futile to remand to the trial court in this instance because the comments the trial court made at sentencing about Caldwell's criminal history in deciding to deny Caldwell's motion to strike his prior strike show that the trial court would not have exercised its discretion to strike the five-year enhancement for the prior serious felony if it had been presented with that issue.

"Generally, when the record shows that the trial court proceeded with sentencing on the erroneous assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing." (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1228.) Only if " 'the record shows that the trial court would not have exercised its discretion even if it believed it could do so, then remand would be an idle act and is not required.' " (*People v. Gamble* (2008) 164 Cal.App.4th 891, 901; see also *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896 [remand to exercise discretion to strike prior strike convictions is not required where "the record shows that the sentencing court clearly indicated that it would not, in any event, have exercised its discretion to strike the allegations"].) Here, the trial court did not make any comments at the sentencing hearing that would permit us to conclude that it categorically would not exercise its discretion to strike the five-year enhancement for Caldwell's prior serious felony. Indeed, we note that the trial court chose to impose the low-term sentence for the robbery conviction. We therefore remand this case to allow the trial court to decide whether to exercise its discretion to strike the five-year enhancement imposed under section 667, subdivision (a), and if it does so, to resentence Caldwell. We express no opinion as to how the trial court should exercise its discretion on remand.

C. *Caldwell Forfeited His Right to Request Mental Health Diversion, and the Issue of Whether Defense Counsel Was Ineffective Is Not Appropriate to Resolve on Direct Appeal Based on the Current Record*

Section 1001.36, which took effect on June 27, 2018, authorizes pretrial diversion for defendants with mental disorders. (Stats. 2018, ch. 34, § 24.) " '[P]retrial diversion'

means the postponement of prosecution, either temporarily or permanently, at any point in the judicial process from the point at which the accused is charged until adjudication, to allow the defendant to undergo mental health treatment . . . ." (§ 1001.36, subd. (c).)

A court may grant pretrial diversion under section 1001.36 if the court finds: (1) the defendant suffers from an identified mental disorder; (2) the mental disorder played a significant role in the commission of the charged offense; (3) the defendant's symptoms will respond to treatment; (4) the defendant consents to diversion and the defendant waives the defendant's speedy trial rights; (5) the defendant agrees to comply with treatment; and (6) the defendant will not pose an unreasonable risk of danger to public safety, as defined in section 1170.18, if the defendant is treated in the community. (§ 1001.36, subd. (b).) The defendant bears the burden of making a prima facie showing that he will meet the minimum eligibility requirements for diversion. (§ 1001.36, subd. (b)(3).)

In this case, a complaint was originally filed against Caldwell on June 6, 2018. An amended complaint was filed on June 15, 2018, and a preliminary hearing was held on June 20, 2018. Section 1001.36 took effect on June 27, 2018, a week after the preliminary hearing. (Stats. 2018, ch. 34, § 37.) This case proceeded to trial and sentencing without defense counsel raising any issue as to whether Caldwell should be considered for pretrial diversion under the newly enacted statute.

For the first time on appeal, Caldwell contends that he should be considered for pretrial diversion, and that we should remand this matter to the trial court with directions that it consider the issue. Caldwell relies on case law holding that for cases on appeal

that are not yet final, section 1001.36 applies retroactively, and an appellate court may remand a matter for the trial court to consider whether the defendant should be granted pretrial diversion. (See, e.g., *People v. Frahs* (2018) 27 Cal.App.5th 784, 791, review granted December 27, 2018, S252220.) However, courts disagree on the issue of retroactivity (see, e.g., *People v. Craine* (2019) 35 Cal.App.5th 744), and the issue is currently pending before our Supreme Court in *Frahs*.

We need not address whether 1001.36 is retroactive in order to resolve Caldwell's appeal. Here, section 1001.36 was enacted a week after Caldwell's preliminary hearing.[8] At the time of trial in mid-August 2018, section 1001.36 had been in effect for over one and a half months. Section 1001.36 provides for a consideration by the trial court of whether the defendant has made a prima facie showing of eligibility for pretrial diversion "[a]t any stage of the proceedings." (§ 1001.36, subd. (b)(3).) Further pretrial diversion is available "at any point in the judicial process from the point at which the accused is charged until adjudication." (§ 1001.36, subd. (c).) Therefore, there was ample time for defense counsel to attempt to make a prima facie case of Caldwell's eligibility for pretrial diversion and for the trial court to fully consider the issue before this case was adjudicated. Under those circumstances, principles of retroactivity do not provide a basis for us to remand this matter with directions for the trial court to consider whether to grant pretrial diversion. Case law approving the retroactive application of section 1001.36 to a defendant with a pending appeal applies only to defendants who had an appeal pending

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8 We also need not, and do not, address the People's contention that pretrial diversion was unavailable for other reasons specific to Caldwell's case.

when section 1001.36 went into effect, giving the defendant no opportunity to raise the issue of pretrial diversion with the trial court in the first instance.

Here, in contrast, defense counsel could have raised the issue of pretrial diversion for Caldwell in the trial court, but she did not do so. Although we are not aware of any case law considering whether a defendant who had a meaningful opportunity to seek pretrial diversion in the trial court forfeits the ability to seek a remand from the appellate court for that purpose, we conclude that the application of the forfeiture rule in such a case is warranted. Section 1001.36 provides that the trial court may order pretrial diversion "at any point in the judicial process from the point at which the accused is charged until adjudication." (§ 1001.36, subd. (c).) Therefore, a defendant has the burden to raise the issue of pretrial diversion in the trial court *prior to adjudication*, and if he fails to do so, he may not do so for the first time on appeal. (Cf. *People v. Carmony* (2004) 33 Cal.4th 367, 375-376 ["any failure on the part of a defendant to invite the court to dismiss [a strike] under section 1385 following *Romero* waives or forfeits his or her right to raise the issue on appeal"].) Caldwell has accordingly forfeited his right to raise the issue of pretrial diversion for the first time on appeal.

Recognizing that we might conclude that he forfeited the right to seek pretrial diversion for the first time on appeal, Caldwell argues that we should conclude that relief is still available to him because he received ineffective assistance of counsel when defense counsel failed to pursue pretrial diversion. A criminal defendant is constitutionally entitled to effective assistance of counsel. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15; *Strickland v. Washington* (1984) 466 U.S. 668, 684-685; *People v.*

Frye (1998) 18 Cal.4th 894, 979.) To establish ineffective assistance "the defendant must first show counsel's performance was deficient, in that it fell below an objective standard of reasonableness under prevailing professional norms. Second, the defendant must show resulting prejudice, i.e., a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different." (*People v. Mai* (2013) 57 Cal.4th 986, 1009.) An ineffective assistance of counsel claim fails if the defendant makes an insufficient showing on either one of these components. (*Strickland*, at p. 687.) "It is defendant's burden to demonstrate the inadequacy of trial counsel." (*People v. Lucas* (1995) 12 Cal.4th 415, 436.) "It is particularly difficult to prevail on an *appellate* claim of ineffective assistance. On direct appeal, a conviction will be reversed for ineffective assistance only if (1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation. All other claims of ineffective assistance are more appropriately resolved in a habeas corpus proceeding." (*Mai*, at p. 1009.)

Here, the record is silent on the question of why defense counsel failed to raise the issue of pretrial diversion with the trial court. It is possible that the failure to raise the issue was due to ignorance of the newly passed statute. However, it is also possible that defense counsel had sound reasons for failing to pursue the issue. For example, she may have sought out information about Caldwell's mental health history and determined that he did not meet the requirements for pretrial diversion. She may also have conferred with Caldwell about the possibility of pretrial diversion but learned that he did not want to

pursue it. There could also be other facts not before us that led defense counsel to conclude the trial court would have found some of the other requirements of pretrial diversion to be lacking in Caldwell's case. Accordingly, it is simply not appropriate on the silent record that we have before us to decide whether defense counsel was ineffective for failing to raise the issue pretrial diversion in the trial court. The issue would be more appropriately considered in the context of a habeas corpus proceeding.

DISPOSITION

The judgment is reversed and remanded to the trial court with directions that it decide whether to exercise its discretion to strike the five-year enhancement for Caldwell's prior serious felony conviction. If the trial court decides to exercise its discretion to strike the enhancement, it shall resentence Caldwell. If the trial court does not strike the enhancement, it shall reinstate the judgment. In all other respects, the judgment is affirmed.

IRION, J.

WE CONCUR:

HALLER, Acting P. J.

AARON, J.